

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 11, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FREDERICK GENTRY,

Plaintiff,

v.

BARBARA BARRETT, in her official
capacity as the Secretary of the United
States Air Force,

Defendant.

No. 2:20-cv-00050-SMJ

**ORDER DENYING MOTION TO
DISMISS AND MOTION TO
STRIKE**

Before the Court, without oral argument, are Defendant Barbara Barrett's Motion to Dismiss, ECF No. 8, and Plaintiff Frederick Gentry's Motion to Strike, ECF No. 10. Defendant seeks dismissal of Plaintiff's complaint for failure to state a claim alleging disability discrimination and failure to accommodate under the Rehabilitation Act. ECF No. 8. Plaintiff seeks to strike an attachment to the Motion to Dismiss as inappropriate on a motion under Federal Rule of Civil Procedure 12(b)(6). Having reviewed the motions and the file in this matter, the Court is fully informed and denies both motions.

BACKGROUND

Plaintiff filed this action on February 3, 2020, asserting he was employed by

1 Defendant with the Joint Personnel Recovery Agency (JPRA) as a civilian
2 employee of the U.S. Air Force. ECF No. 1. Plaintiff asserts he worked as a Program
3 Manager for the Joint Resistance Training Instructor Course (JRTIC) beginning on
4 October 1, 2015 and was employed in a similar role since January 1, 2011. *Id.* at 5.
5 The Complaint also outlines Defendant's prior work history, including over twenty
6 years' experience in the U.S. Air Force and with a federal government contractor
7 working for the JPRA. *Id.* at 4. Plaintiff asserts his job duties as a Program Manager
8 primarily involved desk work, but that he would sometimes directly train students
9 and supervise instructors. *Id.* at 6. Approximately once every other month, Plaintiff
10 would "role play" or teach others how to "role play." *Id.* This "role play" involved
11 pretending to be an enemy combatant in order to simulate the environment a U.S.
12 servicemember may experience if held in enemy captivity. *Id.*

13 However, Plaintiff asserts the job description for the Program Manager
14 position, outlined in a "core professional document" (CPD), did not "hint, imply,
15 state, or otherwise indicate that an essential function of the Program Manager
16 position that Mr. Gentry occupied involved 'role play.'" *Id.* at 5. On June 27, 2016
17 Plaintiff allegedly told a supervisor that he suffered from Post-Traumatic Stress
18 Disorder (PTSD) and asked to be moved to a position other than the JRTIC Program
19 Manager. *Id.* at 7. Plaintiff alleges that on July 6, 2016, he was counseled for poor
20 job performance by the supervisor to whom he reported his PTSD, despite never

1 having been counseled for poor job performance in his entire work history as either
2 a contractor or while directly employed by Defendant. *Id.* at 8. Two days later,
3 Plaintiff's second-level supervisor also counseled him for poor job performance. *Id.*

4 In the fall of 2016, Plaintiff asserts his mental health care provider reported
5 to Defendant's in-house psychologist that Plaintiff could give role play instructions
6 and likely would be able to resume directly inflicting duress in a role play capacity
7 in the future. *Id.* After receiving this information, Defendant issued a memorandum
8 in November 2016 deeming role play as an essential function of the JRTIC Program
9 Manager position, but without following the normal process to modify the CPD
10 associated with the position. *Id.* at 9. On June 28, 2017, Plaintiff's reassignment
11 request was allegedly denied, and on September 30, 2017, Plaintiff received an
12 annual performance evaluation indicating that he "was doing an excellent job
13 supporting" the JPRA programs. *Id.* However, on November 13, 2017, Defendant
14 allegedly told Plaintiff that it intended to fire him because of his PTSD and provided
15 Plaintiff with an opportunity to rebut the decision. *Id.* The commanding officer for
16 the JPRA, before responding to the notice of intent to fire Plaintiff, allegedly told
17 Plaintiff he was obligated to apply for disability retirement. *Id.* at 10. Plaintiff
18 asserts he followed this directive but noted in the application that he had requested
19 accommodations and was told there were no positions he could fill. *Id.* Plaintiff was
20 terminated on May 16, 2018. *Id.*

LEGAL STANDARD

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), the Court must dismiss a complaint if it “fail[s] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A complaint is subject to dismissal under Rule 12(b)(6) if it either fails to allege a cognizable legal theory or fails to allege sufficient facts to support a cognizable legal theory. *Kwan v. SanMedica Int’l*, 854 F.3d 1088, 1093 (9th Cir. 2017).

To survive a Rule 12(b)(6) motion, a complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility exists where a complaint pleads facts giving rise to a reasonable inference that the defendant is liable to the plaintiff for the misconduct alleged. *Id.* Plausibility does not require probability but demands more than a mere possibility of liability. *Id.* While a complaint need not contain detailed factual allegations, unadorned accusations of unlawful harm, naked assertions of wrongdoing, labels and conclusions, and formulaic or threadbare recitals of a cause of action’s elements, supported only by mere conclusory statements, are not enough. *Id.* The Court may also grant a Rule 12(b)(6) motion where a complaint’s allegations, on their face, suffice to establish an affirmative

1 defense. *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013) (quoting *Jones*
 2 *v. Bock*, 549 U.S. 199, 215 (2007)).

3 In deciding a Rule 12(b)(6) motion, the Court construes a complaint in the
 4 light most favorable to the plaintiff and draws all reasonable inferences in his or her
 5 favor. *Ass'n for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991
 6 (9th Cir. 2011). Thus, the Court must accept as true all factual allegations contained
 7 in a complaint but may disregard legal conclusions couched as factual allegations.
 8 *See Iqbal*, 556 U.S. at 678.

9 DISCUSSION

10 **A. Plaintiff's failure to accommodate claim is timely and evidence of time-** 11 **barred acts are relevant to Plaintiff's timely claims**

12 Defendant asserts Plaintiff's failure to accommodate claim is untimely
 13 because it is based on events from 2016 and 2017. ECF No. 8 at 3–5. Plaintiff does
 14 not argue that the events from 2016 and 2017 state a timely claim for failure to
 15 accommodate, but rather that these are relevant background facts related to his
 16 claim stemming from his termination on May 15, 2018.¹ ECF No. 9 at 9.

17
 18 ¹ Plaintiff also presents arguments related to whether his disability discrimination
 19 claim with the Equal Employment Opportunity counselor constituted a consultation
 20 for his failure to accommodate claim. ECF No. 9 at 9. However, the Court does not
 address this argument because the Court understands Defendant is not arguing for
 dismissal on this issue. Defendant's Motion to Dismiss instead focuses on the
 timeliness of a failure to accommodate claim based on events in 2016 and 2017. *See*
 ECF No. 8 at 3–5.

1 To assert a claim under the Rehabilitation Act, a federal employee must
2 exhaust available administrative remedies. *Cherosky v. Henderson*, 330 F.3d 1243,
3 1246 (9th Cir. 2003). The employee must first consult with the agency's Equal
4 Employment Opportunity (EEO) counselor "prior to filing a complaint in order to
5 try to informally resolve the matter." 29 C.F.R. § 1614.105(a). The aggrieved
6 employee "must initiate contact with a Counselor within 45 days of the date of the
7 matter alleged to be discriminatory or, in the case of personnel action, within 45
8 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). "Failure to
9 comply with this regulation is 'fatal to a federal employee's discrimination claim.'" *Cherosky*, 330 F.3d at 1246 (quoting *Lyons v. England*, 307 F.3d 1092, 1105 (9th
10 Cir. 2002)). However,

12 The existence of past acts and the employee's prior knowledge
13 of their occurrence . . . does not bar employees from filing charges
14 about related discrete acts so long as the acts are independently
15 discriminatory and charges addressing those acts are themselves
timely filed. *Nor does the statute bar an employee from using the prior
acts as background evidence in support of a timely claim.*

16 *Lyons*, 307 F.3d at 1108 (alteration and emphasis in original) (quoting *AMTRAK*
17 *v. Morgan*, 536 U.S. 101, 113 (2002)).

18 Defendant does not argue that Plaintiff initiated contact with the EEO office
19 more than forty-five days after his termination, but rather that specific events
20 described in the Complaint between October 1, 2015 and December 19, 2017 cannot

1 constitute independent claims for failure to accommodate. ECF No. 8 at 5. The
2 Court agrees these would be time-barred if Plaintiff were to assert them as separate
3 claims for failure to accommodate. *See Lyons*, 307 F.3d at 1108 (holding claims
4 based on discrete acts of discrimination prior to the limitations period were time-
5 barred). The Complaint is vague as to the specific conduct Plaintiff asserts
6 constituted the basis for his failure to accommodate claim.² *See* ECF No. 1
7 at 12–17. But Plaintiff’s response characterizes these as relevant background events
8 for the failure to accommodate claim arising from Plaintiff’s termination on May
9 15, 2018. ECF No. 9 at 9. Plaintiff’s claim for failure to accommodate based on
10 Plaintiff’s termination is not time-barred. *See* ECF No. 8 at 5 (indicating Plaintiff
11 contacted the EEO counselor on May 30, 2018). As such, Defendant’s Motion to
12 Dismiss is denied as to this claim.

13 **B. The Applicant’s Statement of Disability is not incorporated by reference**

14 Defendant next moves to dismiss Plaintiff’s disability discrimination claim,
15 arguing Plaintiff’s sworn statement for disability retirement precludes this claim.
16 ECF No. 5 at 5–9. Defendant attaches the “Applicant’s Statement of Disability,”
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18 ² For example, the Complaint repeatedly references “the timeframe relevant to
19 [Plaintiff]’s lawsuit” when discussing the failure to accommodate claim. ECF No. 1
20 at 15–16. However, the Complaint also specifies that “At or near the time
[Defendant] fired [Plaintiff], it had at least 13 unfilled positions; yet [Defendant]
made no attempt to place [Plaintiff] into many, if not all, of those positions.” *Id.*
at 16.

1 ECF No. 8-2, in support of this argument.³ Plaintiff contends the Complaint pleads
2 sufficient facts to support this claim and that the arguments presented are more
3 appropriate for consideration in a motion for summary judgment. Plaintiff also
4 separately moves to strike the extra-pleading documents. ECF No. 10.

5 Generally, the Court “may not consider material outside the pleadings when
6 assessing the sufficiency of a complaint under Rule 12(b)(6).” *Khoja v. Orexigen*
7 *Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). Typically, the Court must
8 convert a Rule 12(b)(6) motion into a summary judgment motion if “matters outside
9 the pleadings are presented to and not excluded by the court.” Fed. R. Civ. P. 12(d).
10 Two exceptions to this rule exist: “the incorporation-by-reference doctrine, and
11 judicial notice under Federal Rule of Evidence 201.” *Khoja*, 899 F.3d at 998.
12 Rule 201 permits a court to notice an adjudicative fact if it is “not subject to
13 reasonable dispute,” meaning it is “generally known,” or “can be accurately and
14 readily determined from sources whose accuracy cannot reasonably be questioned.”
15 Fed. R. Evid. 201(b)(1)–(2). The Court may also consider documents not attached
16 to a complaint, but which are incorporated by reference into the complaint because

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18 ³ Defendant also attached a copy of an Air Force Core Personnel Document to the
19 Motion to Dismiss. ECF No. 8-3. However, the Motion to Dismiss references this
20 document once in a footnote and does not otherwise rely on its contents. ECF No. 8
at 8. Because the Motion to Dismiss fails for the reasons set forth below, the Court
does not consider this document and need not determine whether it was
incorporated by reference into the Complaint.

1 “the plaintiff refers extensively to the document or the document forms the basis of
2 the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

3 Defendant implicitly argues the Court may consider the Applicant’s
4 Statement of Disability without converting this motion into one for summary
5 judgment because the Complaint references Plaintiff’s disability retirement
6 application. ECF No. 8 at 2. However, this document is not referred to extensively
7 in the Complaint, nor does the document form the basis of Plaintiff’s claim. *See*
8 *Koja*, 899 F.3d at 1002 (“[The Ninth Circuit] has held that ‘the mere mention of the
9 existence of a document is insufficient to incorporate the contents of a document.’”
10 (citing *Ritchie. Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010))).

11 The Complaint mentions that Plaintiff filed for disability retirement after the
12 commanding officer for the JPRA instructed him to do so. ECF No. 1 at 10. The
13 existence of the Applicant’s Statement of Disability is not specifically mentioned,
14 though its existence is implied, and Defendant fails to explain how this document
15 is necessarily relied on to form the basis of Plaintiff’s allegations. The document
16 may, as Defendant argues, create a defense to the claim, but this is not a sufficient
17 basis to find it is incorporated by reference. *Koja*, 899 F.3d at 1002 (“[I]f the
18 document merely creates a defense to the well-pled allegations in the complaint,
19 then that document did not necessarily form the basis of the complaint.”). The Court
20 finds that the incorporation of this document would more appropriately fall within

1 the “overuse and improper application of judicial notice and the incorporation-by-
2 reference doctrine,” which the Ninth Circuit cautioned against in *Koja*. 899 F.3d
3 at 988.

4 Having found this document was not incorporated by reference, the Court
5 next considers whether it is proper to convert this motion to one for summary
6 judgment. This case is in its nascent stages. The parties not engaged in discovery,
7 no answer has been filed, and no scheduling order has been issued. As such,
8 conversion to a motion for summary judgment is not appropriate.

9 Defendant’s argument that Plaintiff’s disability discrimination claim should
10 be dismissed relies entirely on the Applicant’s Statement of Disability to refute the
11 allegations in the Complaint. Defendant has not presented any arguments that the
12 Complaint fails to state a claim upon which relief can be granted. As such, the
13 motion is denied as to Plaintiff’s disability discrimination claim. Because the Court
14 declines to consider the Applicant’s Statement of Disability attached to the Motion
15 to Dismiss and declines to convert this to a motion for summary judgment,
16 Plaintiff’s separate Motion to Strike, ECF No. 10, is denied as moot.

17 CONCLUSION

18 Plaintiff’s claim for failure to accommodate based on Plaintiff’s termination
19 is not time-barred. Although the Complaint is vague as to the specific events relied
20 upon to form the basis of the failure to accommodate claim, Plaintiff has represented

1 that the discrete event on which his failure to accommodate claim is based is his
2 termination. As to Plaintiff's claim for disability discrimination, the Court finds the
3 Applicant's Statement of Disability is not incorporated by reference into the
4 Complaint and declines to convert the instant motion into one for summary
5 judgment. As such, Defendant's Motion to Dismiss must be denied.

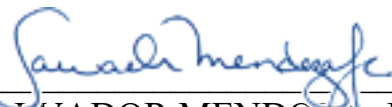
6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. Defendant's Motion to Dismiss, **ECF No. 8**, is **DENIED**.

8 2. Plaintiff's Motion to Strike, **ECF No. 10**, is **DENIED AS MOOT**.

9 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
10 provide copies to all counsel.

11 **DATED** this 11th day of June 2020.

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13 SALVADOR MENDOZA, JR.
14 United States District Judge
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